

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re Pork Antitrust Litigation ) File No. 18-CV-1776  
) (JRT/HB)  
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This Document Relates to: )  
)  
All Actions )  
) St. Paul, Minnesota  
) September 7, 2021  
) 3:41 p.m.  
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BEFORE THE HONORABLE HILDY BOWBEER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**(MOTIONS HEARING)**

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Proceedings reported by court reporter; transcript  
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**P R O C E E D I N G S**

**IN OPEN COURT**

**(VIA ZOOM)**

THE COURT: This is the United States District Court for the District of Minnesota. I am Magistrate Judge Hildy Bowbeer.

And we are convened by Zoom for a hearing in the matter of In re Pork Antitrust Litigation, 18-CV-1776, and specifically on Docket Number 883, a motion by the direct purchaser plaintiffs to compel Hormel to produce responsive text message content and to enforce subpoenas to Hormel custodians.

We've got a large group, including quite a few who appear to be joining us by telephone. I will try to make some sense of it in terms of making sure our court reporter knows who wants to make their appearance known and who not so much.

So let me just start with the plaintiffs. And first on behalf of the direct purchaser plaintiffs, I will call out the names of the people I spotted in the waiting room and then I'll give folks an opportunity to let me know if you didn't hear your name called but want your appearance noted.

So on behalf of the direct purchaser plaintiffs, I saw Bobby Pouya?

1 MR. POUYA: Hello, Your Honor.

2 THE COURT: Brian Clark?

3 MR. CLARK: Good afternoon.

4 THE COURT: Joseph Bourne?

5 MR. BOURNE: Good afternoon, Your Honor.

6 THE COURT: Arielle Wagner?

7 MS. WAGNER: Good afternoon.

8 THE COURT: And Michael Pearson?

9 MR. MICHAEL PEARSON: Good afternoon, Your Honor.

10 THE COURT: And is there anyone on behalf of the  
11 direct purchaser plaintiffs whose name I didn't call?

12 MR. CLIFFORD PEARSON: Good afternoon, Your Honor.  
13 Clifford Pearson.

14 THE COURT: All right. Moving on to the consumer  
15 and institutional indirect purchaser plaintiffs, I saw  
16 Blaine Finley?

17 MR. FINLEY: Good afternoon, Your Honor.

18 THE COURT: And are there any other counsel on  
19 this afternoon for the consumer and institutional indirect  
20 purchaser plaintiffs?

21 MR. FINLEY: I don't believe so, Your Honor.

22 THE COURT: All right. The consumer indirect  
23 purchaser plaintiffs, I saw Shana Scarlett?

24 MS. SCARLETT: Good afternoon, Your Honor.

25 THE COURT: And Daniel Hedlund?

1 MR. HEDLUND: Good afternoon, Judge.

2 THE COURT: Anyone else whose name I didn't call  
3 on behalf of the consumer indirect purchaser plaintiffs?

4 Is there anybody else on behalf of a plaintiff of  
5 any type who is attending and would like their appearance  
6 noted?

7 All right. Then moving on to the party involved  
8 or the defendant involved in this particular motion, on  
9 behalf of Hormel Foods Corporation, I saw Craig Coleman?

10 MR. COLEMAN: Yes, Your Honor. Good afternoon.

11 THE COURT: Anyone else on behalf of Hormel Foods  
12 Corporation? And by that I will separate the appearance on  
13 behalf of the document custodians. Mr. Coleman, anyone else  
14 appearing on behalf of the corporation?

15 MR. COLEMAN: No, Your Honor. I'm the only lawyer  
16 appearing on behalf of Hormel Foods. Steve Toeniskoetter,  
17 senior attorney at Hormel Foods, is participating through  
18 the audio line.

19 THE COURT: All right. And I've got -- the  
20 spelling I've got on that is T-o-e-n-i-s-k-o-e-t-t-e-r. Is  
21 that correct?

22 MR. COLEMAN: I believe that's correct, Your  
23 Honor.

24 THE COURT: All right. We'll note his presence  
25 here for the hearing.

1                   And then I know there's counsel here on behalf of  
2                   the subpoena recipients, the document custodians. John  
3                   Rock?

4                   MR. ROCK: Good afternoon, Your Honor.

5                   THE COURT: And Kathryn Stephens?

6                   MS. STEPHENS: Yes. Good afternoon, Judge.

7                   THE COURT: And then I think I saw some others on  
8                   behalf of other defendants. On behalf of The Clemens Family  
9                   Corporation, Christina Sharkey?

10                  MS. SHARKEY: Good afternoon, Your Honor.

11                  THE COURT: And I believe Mark Johnson as well?

12                  MR. JOHNSON: Yes, Your Honor. Good afternoon.

13                  THE COURT: And on behalf of Triumph Foods, I  
14                  think I saw Jason Husgen?

15                  MR. HUSGEN: Yes. Good afternoon, Your Honor.

16                  THE COURT: Did I mispronounce your name or did I  
17                  get it approximately --

18                  MR. HUSGEN: You are one of the few people who on  
19                  the first attempt pronounced it correctly, Your Honor. I  
20                  appreciate it.

21                  THE COURT: Oh, now it's going to go to my head.  
22                  Anybody else on behalf of Triumph?

23                  On behalf of Seaboard Foods, I think I saw William  
24                  Thomson?

25                  MR. THOMSON: Good afternoon, Your Honor.

1 THE COURT: And then I see some others, but I  
2 couldn't place them with a particular party. So is there  
3 anyone whose name I did not call who wants to have their  
4 appearance noted this afternoon?

5 MR. TAYLOR: Your Honor, this is Jarod Taylor of  
6 Axinn, Veltrop & Harkrider appearing by phone only for the  
7 Tyson defendants.

8 THE COURT: All right. Hold on one moment. Just  
9 for the benefit of the court reporter, would you spell your  
10 last name, please.

11 MR. TAYLOR: T-a-y-l-o-r.

12 THE COURT: Your first name is J-a-r-o-d, right?

13 MR. TAYLOR: Yes, Your Honor. You are batting a  
14 thousand today, because most people don't get that right on  
15 the first try either.

16 THE COURT: All right. Anyone else on behalf of  
17 any party who wants to have their appearance noted this  
18 afternoon?

19 All right. Then one thing I am going to do is  
20 adjust my video so that I don't see all of the little  
21 telephone icons and can focus on those of you who are  
22 actually going to be addressing this motion. Oh, that's a  
23 much less crowded screen.

24 And then with regard to the motion, it's my --  
25 well, let me ask: On behalf of the plaintiffs, who is going



1 to be taking the lead on speaking to this motion?

2 MR. BOURNE: Good afternoon, Your Honor. Joe  
3 Bourne from Lockridge, Grindal, Nauen speaking on behalf of  
4 the direct purchaser plaintiffs and the class plaintiffs who  
5 joined in the motion.

6 THE COURT: All right. And then on behalf of  
7 Hormel Foods Corporation, Mr. Coleman, I know you are going  
8 to be speaking. And, Mr. Rock, I believe you were going to  
9 be doing the honors on behalf of the document custodians.  
10 Is that right?

11 MR. ROCK: Correct, Your Honor.

12 THE COURT: All right. Very well. Then,  
13 Mr. Bourne, this is your motion.

14 MR. BOURNE: Thank you, Your Honor. We are here  
15 today because plaintiffs are receiving text messages and  
16 cell phone data from every defendant except Hormel.  
17 Plaintiffs have been unable to obtain the text messages of  
18 Hormel's agreed document custodians either from Hormel or  
19 from the custodians directly via subpoena.

20 And today we are asking the Court to compel Hormel  
21 to produce its current employees' relevant and responsive  
22 phone data; and, separately, we're asking the Court to  
23 compel the custodians to comply with the subpoenas.

24 We knew from the outset of the case that important  
25 information was likely only available on the cell phones of

1 defendants' employees. So at the start of the litigation we  
2 asked Hormel to image the mobile devices for five senior  
3 executives that we identified, and Hormel said that it  
4 would. How did it do that? Apparently by asking them and  
5 obtaining their consent. Hormel has never claimed that it  
6 even asked any of its custodians for permission to search  
7 their phones for text messages relevant to this litigation.

8 So once we learned that Hormel wasn't preserving  
9 and collecting its custodians' cell phone data, plaintiffs  
10 subpoenaed Hormel's document custodians as an additional  
11 avenue to try to obtain the documents. But even with the  
12 subpoenas, the custodians have refused to run a robust  
13 search based on their objection that they are third parties  
14 to this litigation.

15 Both Hormel and its custodians' investigations are  
16 inadequate. It's our position that you have to search for  
17 text messages using an adequate methodology, not just ask  
18 the custodian if they believe that relevant documents exist.

19 In a similar context, you wouldn't rely on a  
20 custodian's recollection rather than conduct a keyword  
21 search or TAR search for e-mail, and the same should hold  
22 true for text messages.

23 THE COURT: Let me ask this. When did Hormel  
24 first let the plaintiffs know that it did not believe that  
25 it had and did not take the position that it had possession,

1 custody, and control over its employees' cell phones?

2 MR. BOURNE: Your Honor, I believe Hormel advised  
3 plaintiffs of that in correspondence in 2018 or 2019  
4 relating to those five senior executives on whose behalf it  
5 advised Hormel doesn't believe that their phones are in its  
6 possession, custody or control, but nevertheless it agreed  
7 to image their phones, of those five executives, for  
8 preservation purposes.

9 Plaintiffs didn't become aware or fully comprehend  
10 that Hormel was not going to produce any text messages from  
11 any of its custodians until earlier this year.

12 THE COURT: And are you saying you've got -- that  
13 you haven't gotten any text messages or anything that seems  
14 to be a text message from any Hormel custodian at this  
15 point?

16 MR. BOURNE: That is my understanding, and I don't  
17 understand Hormel to contest that point. My understanding  
18 from our meet-and-confers is that Hormel is universally  
19 taking the position these are outside of our possession,  
20 custody, or control and therefore we will not search for or  
21 produce any text messages.

22 THE COURT: So when they told you in, I think it  
23 was, late October or so of 2018 that they were taking the  
24 position that they don't have possession, custody, or  
25 control over their employees' devices because their cell

1 phones are personally owned rather than company owned, are  
2 you saying that since they had agreed to image the five  
3 senior executive devices, that that meant that as  
4 custodian -- so that as custodians were identified, they  
5 would be imaging all of those?

6 MR. BOURNE: Your Honor, I think that's a fair  
7 inference from what they represented when they said in  
8 October 2018 we'll image these five executives' phones even  
9 though we take the position they're outside our possession,  
10 custody, or control. I think it would be a reasonable  
11 inference to assume that the same would hold true for the  
12 other custodians.

13 I can't say for sure what all of the class  
14 plaintiffs thought at that time apart from the fact that it  
15 didn't appear that we had a ripe dispute to bring to the  
16 Court's attention.

17 THE COURT: All right. Go ahead.

18 MR. BOURNE: In the meet-and-confer process and in  
19 the briefing on this motion, we've learned that Hormel did  
20 nothing to investigate the existence of relevant text  
21 messages. It apparently never interviewed the custodians  
22 about text messages or phone data, and it never asked for  
23 permission to search their phones. On page 17 of its brief  
24 Hormel even admits that it doesn't even know whether or  
25 where cloud backups exist.

1 Third-party counsel for the custodians did do more  
2 than that. They interviewed the custodians and asked if  
3 they used their phones for work-related text messages  
4 outside of Hormel, and a few of them said yes.

5 But plaintiffs submit that investigation is still  
6 not enough. You can't always rely on someone's memory of  
7 text messages they sent over, you know, a span of years to  
8 know whether a Hormel person may have exchanged one or two  
9 text messages with a Tyson employee, for example, and that's  
10 why we would say go look for them and see if there's  
11 anything there.

12 What we do know is that the custodians used their  
13 phones for work. We know that at least some of the  
14 custodians sent text messages to work contacts based on the  
15 incomplete carrier data that we've obtained so far. We are  
16 still waiting for carrier data from Jaguar, which I  
17 understand applies to some of the Hormel custodians. And  
18 the carrier data also would not reveal an iMessage to  
19 iMessage text message. So we believe there are likely  
20 others in addition to the text messages that we identified  
21 in our papers.

22 But what we do know is that Hormel designated all  
23 these people as custodians because they're likely to have  
24 relevant, discoverable information. And text messages are  
25 important, therefore Hormel should go search for them and

1 the custodians should search for them.

2 THE COURT: In terms of the information from  
3 carriers, I mean, do you have any text content from the  
4 carriers that tells you, yes, we've got examples of actual  
5 substantive content that was communicated by text or is that  
6 an inference you're drawing from the fact that it was a work  
7 number to a work number communication?

8 MR. BOURNE: We know of the existence of work  
9 number to work number or phone number to phone number text  
10 messages. We don't know what any of them say. The content  
11 of the text messages is not available from the carriers.  
12 But the defendants have provided both work numbers and cell  
13 phone numbers for their employees, and based on that we have  
14 some records of Hormel custodians using text messages and  
15 sending them to other people who would be work contacts.

16 THE COURT: All right. Any that match your  
17 inter-defendant screen?

18 MR. BOURNE: Your Honor, most of the text messages  
19 that we have from the carrier data we have so far appeared  
20 to be Hormel to Hormel text messages, although in the  
21 declaration of Ms. Stephens in support of the custodians'  
22 opposition brief, she notes that some of the custodians  
23 acknowledge that they sent text messages to employees at  
24 other defendants. I think "a few" is the language that's  
25 used in her declaration.

1 THE COURT: So essentially apart from the  
2 possession, custody, and control issue, which I recognize  
3 looms very large here, but essentially it's your argument  
4 that if someone is identified as a custodian, then the  
5 company ought to be doing a search of all means of  
6 communication, even if -- that that custodian may have had  
7 access to even if the custodian says, no, I didn't use that  
8 means of communication when I was doing work?

9 MR. BOURNE: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. BOURNE: The class period and the discovery  
12 period are lengthy, and even -- you know, we're not trying  
13 to impute bad intentions to anyone here, but the fact is  
14 over a lengthy period of time you could think, hey, I  
15 generally send e-mail or make phone calls for work and  
16 innocuously answer, no, I didn't send work text messages,  
17 only if you actually look at the text messages there could  
18 be a few. I mean, that's why you have to go and actually  
19 look for them. That is plaintiffs' position.

20 THE COURT: Okay. Go ahead.

21 MR. BOURNE: Thank you. Turning to the  
22 possession, custody, or control issue with respect to  
23 Hormel, in this district the case law defines "control" to  
24 include both the legal right and the practical ability.  
25 Hormel's case law, as cited in their brief, is limited to

1 the legal right standard, but that -- plaintiffs submit that  
2 simply is not the law in this district.

3 As noted above, Hormel never even asked its  
4 custodians if they would voluntarily provide their phones  
5 for searching, but we have every reason to believe that the  
6 custodians would have consented if Hormel made this request.  
7 For example, the five senior executives mentioned before  
8 consented to imaging their phones and, you know, that  
9 usually people will want to help out their employer by  
10 providing relevant information for a lawsuit that the  
11 employer is involved in.

12 In addition, Hormel's mobile device policy  
13 required employees to buy personal cell phones to use for  
14 work, and it let Hormel remotely and instantly wipe the  
15 entire contents of any employee's personal mobile device.  
16 So this shows a level of control that Hormel has over its  
17 employees' personal cell phones, at least with respect to  
18 the ones who are still employees. And the test isn't  
19 possession or custody or ownership. It's simply control.  
20 Hormel exerts control through its policies.

21 THE COURT: Isn't there a difference, though,  
22 between the ability to reach out and wipe a phone and the  
23 ability to insist that its contents be made available for  
24 the employer to review and potentially produce to someone  
25 else? I mean, one involves just I don't know what it is, I



1 haven't seen it, but I'm wiping it out; and the other is I'm  
2 going to look at it and then in the course of looking at it,  
3 I'll probably see some stuff that doesn't have anything to  
4 do with me, but -- and that you would rather I not see.

5 MR. BOURNE: There is -- I mean, there is a  
6 difference there, they're not exactly the same thing, but  
7 our position is that goes to the test for control and it  
8 goes back to this distinction between the legal right and  
9 the practical ability.

10 So even if Hormel's policy doesn't give it the  
11 legal right to take the phones and search them, based on its  
12 status as an employer and the control that it does exercise,  
13 it's reasonable to infer that Hormel has the practical  
14 ability to obtain this information, which is all that is  
15 required under the control test.

16 THE COURT: Okay. How does the scope of what  
17 you're asking for here, either directly of Hormel or through  
18 the subpoenas, compare with the scope of what would be  
19 requested if these were company-owned devices and there was  
20 no question that Hormel had control over them?

21 MR. BOURNE: The scope of what we're asking for is  
22 exactly the same, if I understand Your Honor's question  
23 correctly. We are asking for Hormel and/or its custodians  
24 to search for relevant information.

25 And we proposed a search methodology, which is

1 attached to my declaration as I believe Exhibit 16, and that  
2 methodology in a nutshell is, one, here's a list of phone  
3 numbers that belong to the defendants or key nondefendant  
4 pork industry participants. We request that attorneys do a  
5 relevant -- a relevance review of those phone number to  
6 phone number contacts. And then separately we provided a  
7 list of search terms and requested that those search terms  
8 hitting on any other phone numbers be -- hits on those  
9 search terms be reviewed for relevance by an attorney.

10 And the goal here is essentially let's try to weed  
11 out purely personal text messages so the volume of text  
12 messages requiring attorney review would be limited and  
13 reasonable, keeping in mind that text messages are different  
14 than e-mails. They're shorter, there will be fewer of them,  
15 and there's more inconsistent spelling and grammar.

16 That basic proposal has been agreed to with some  
17 minor modifications at the margins relating to some of the  
18 phone numbers or search terms by many of the defendants, and  
19 discussions are still ongoing with a minority -- I believe a  
20 minority of the defendants.

21 But it's essentially what we're asking for across  
22 the board from the defendants. And in our view, the fact  
23 that these employees are third parties doesn't change the  
24 fact that this is a reasonable search and will lead to  
25 relevant evidence -- or will potentially lead to relevant

1 evidence.

2 THE COURT: I guess what I'm trying to understand  
3 is Hormel has argued that the 23 additional custodians who  
4 made the list, I think after considerable negotiation in  
5 maybe November of last year, had for the most part fairly  
6 narrow slices of the pie, if you will; in other words, that  
7 there was some fairly active negotiating and there was an  
8 understanding that, okay, we're going to add these two  
9 people because they were in this particular role, we're  
10 going to add these five because they were involved but only  
11 during this period. And so I wondered whether that was  
12 accompanied by an understanding that searches of those  
13 custodians' documents and ESI, e-mail, for example, would be  
14 similarly tailored.

15 MR. BOURNE: Your Honor, my understanding is that  
16 it's possible there's one or two very small number of  
17 exceptions, but in general, including for the Hormel  
18 custodians across the board, search terms for e-mail did not  
19 vary from custodian to custodian.

20 THE COURT: All right. And was that true for time  
21 frame as well? And maybe the time frame was a search term.

22 MR. BOURNE: I believe that's true for a time  
23 frame with the caveat that the time frame, you know, ends  
24 when the person -- when Hormel no longer has their data.  
25 I'm not 100 percent sure on whether there were any

1 variations in time frame for any of the particular Hormel  
2 custodians, but I believe generally they were searched for  
3 the relevant period, assuming that Hormel had their data for  
4 that period, and I'm sure Mr. Coleman will correct me if I'm  
5 wrong.

6 THE COURT: What about Hormel's argument that they  
7 did what the negotiated cell phone preservation protocol  
8 called for them to do? No more, but not less.

9 MR. BOURNE: We aren't here today claiming that  
10 Hormel did not comply with the agreed telephone preservation  
11 protocol. That document relates to preserving carrier data.  
12 And so, you know, it's my understanding that Hormel did  
13 comply with that document by either asking the carriers to  
14 preserve carrier log data or sending letters on behalf of  
15 the -- I believe that Hormel asked the carriers to preserve  
16 relevant data.

17 And the log data that the carriers have is the  
18 existence and timing of phone calls or text messages. So  
19 that's what that document speaks to. It doesn't really  
20 speak to the question of searching for text messages at all.

21 THE COURT: Oh, okay. Okay. I will obviously be  
22 interested in Mr. Coleman's response to that, but that's a  
23 different -- that's certainly a different take on that  
24 document than what I heard from Hormel. So I will learn  
25 more about that.

1           Okay. So are you saying that there isn't a  
2           negotiated -- or not negotiated, but there isn't a protocol  
3           in place or an order in place in this case that prescribes  
4           either an agreement or responsibilities with regard to  
5           preserving text messages and other data like that on cell  
6           phones?

7           MR. BOURNE: I believe that the ESI protocol  
8           requires the preservation of data on cell phones that are  
9           within a party's possession, custody, or control. And so  
10          Hormel's argument that those phones are not within its  
11          possession, custody, or control arguably takes those phones  
12          outside of the ESI protocol, depending on how the Court  
13          rules on the question of possession, custody, or control.

14          The other thing I would point to is the general  
15          obligation under the Federal Rules of Civil Procedure to  
16          preserve all relevant and potentially relevant data for a  
17          litigation.

18          THE COURT: Although that can certainly be  
19          modified by agreement or order and so -- but what you are  
20          saying is that the agreed protocol, which -- by the way, it  
21          was certainly filed in connection with this motion. I don't  
22          think it was ever filed before, or at least I couldn't find  
23          it anywhere on the docket. But in any event, it was signed,  
24          it looks like, May 13th of 2019. That specifically is for  
25          telephone records pertaining to document custodians in the

1 possession of their respective telephone service providers  
2 and doesn't purport to govern more than that, is what you're  
3 saying?

4 MR. BOURNE: That's right, Your Honor.

5 THE COURT: And that beyond that one has to look  
6 either or both, from your perspective, at what the ESI  
7 protocol says about preservation insofar as the data is  
8 within the possession, custody, and control of the party,  
9 but if not, then you're saying -- or if you believe it  
10 isn't, then you're saying you still have to look at case law  
11 and precedent on preservation obligations?

12 MR. BOURNE: Yes, Your Honor, I believe that  
13 accurately captures what I was saying.

14 THE COURT: All right. What else?

15 MR. BOURNE: With respect to the custodians and  
16 the subpoenas, I think it's important to keep in mind that  
17 the case law, as cited in our brief, is pretty clear that  
18 the relevance and discovery standard is the same. We  
19 disagree with the custodians' argument that there needs to  
20 somehow be a greater relevance argument showing under  
21 Rule 45 than under the other rules of discovery. The way I  
22 think it works is that you have to try to get the discovery  
23 from a party, if possible, which we've tried to do and are  
24 doing here, but otherwise relevance is the same and the  
25 scope of discoverable information is the same.

1 THE COURT: Is that true if you think about  
2 proportionality and you think about the resources of the  
3 party? You're saying that I'm not -- that I can't take  
4 account of sort of custodian-specific considerations?

5 MR. BOURNE: That is a good question. I think as  
6 far as determining the need to show relevance, that is the  
7 same. Frankly, the case law on proportionality is so mixed  
8 that it's hard to say for sure exactly what that means at  
9 all times.

10 But I would submit that what the Court should do  
11 here is look at the custodians and say, okay, we have these  
12 custodians, they have cell phones, the process for searching  
13 them is not that burdensome, and simply find that it's not  
14 unduly burdensome under the facts of this case, without the  
15 need to make a more generalized ruling as to that issue.

16 THE COURT: Okay. I'm going to need to turn to  
17 Mr. Coleman here fairly quickly. Are there additional  
18 points you wanted to make sure you emphasized before I let  
19 you off the hot seat?

20 MR. BOURNE: Nothing else at this time, Your  
21 Honor.

22 THE COURT: Let me just check quickly and see if I  
23 had other questions I wanted to ask you specifically.

24 One thing, I am pretty sure I understand it  
25 correctly, but just wanted to confirm. The list of phone

1 numbers and the list of search terms, those were, for lack  
2 of a better word, disjunctive, right? In other words, you  
3 want -- you are looking for there to be a search and then a  
4 relevance review of all hits for any of those phone numbers,  
5 and separately for there to be a search for and a relevance  
6 review of all hits on the search terms, right?

7 MR. BOURNE: That's right. So the way it would  
8 work would be you would review the phone number to phone  
9 number hits; and then for any separate phone numbers, run  
10 the search terms and review any hits on those search terms.

11 THE COURT: Okay. At this point what's your best  
12 evidence, if you will, or your best information, your best  
13 reason to believe that these custodians, in fact, have  
14 relevant text messages on their devices?

15 MR. BOURNE: So separate from -- I guess there are  
16 two pieces to that. One is that we have the existence -- we  
17 have log data showing the existence of some text messages  
18 that, based on who the recipients are, appear to be about  
19 work, which for these Hormel custodians would be about the  
20 pork industry.

21 And apart from that, Your Honor, I would say  
22 common sense. People text all the time. We saw in the  
23 criminal indictment in the broilers case cited in our brief  
24 that text messages became an important part of that  
25 conspiracy. And it's increasingly how people communicate.



1 THE COURT: All right. Okay. Let me give  
2 Mr. Coleman a chance to respond, then. Thank you.

3 Mr. Coleman.

4 MR. COLEMAN: Yes. Thank you, Your Honor.

5 Hormel Foods' mobile device policy and its Bring  
6 Your Own Device program are not litigation positions, and  
7 its opposition to plaintiffs' motion is not about discovery  
8 tactics.

9 The company's cell phone policies are longstanding  
10 company policies and practices that go to the core of its  
11 relationship with its employees and reflect Hormel Foods'  
12 carefully-considered approach to the difficult compromises  
13 and considerations that companies face regarding mobile  
14 devices.

15 So just as a little perspective, Your Honor, the  
16 relevant time period extends nearly to the introduction of  
17 the first iPhone. So this period covers a sea change in how  
18 phones are used and what that means for companies and their  
19 employees.

20 But throughout this time period Hormel Foods has  
21 consistently taken the position that its employees' phones  
22 are personal. Cell phones are owned and controlled by its  
23 employees.

24 And Hormel Foods' policies, practices, and IT  
25 infrastructure mean that it does not have the right to

1 control -- it doesn't have the practical ability to control,  
2 access, inspect, take custody of, or image those phones.  
3 Hormel Foods certainly has never had possession or custody  
4 of the phones in question.

5 So Hormel Foods --

6 THE COURT: Let me just ask a couple of questions  
7 here. First -- I mean, Hormel didn't just make it optional  
8 for people to have a personal phone and, if they had it,  
9 give them the ability to use it for work. Hormel required  
10 people, as I understand it, to have such a device and to use  
11 it for work, to access company data, company systems.

12 So it seems like that may not -- may or may not  
13 mean -- I am not sure where I am yet on possession, custody,  
14 and control, but it certainly means the company -- I'm  
15 sorry, I keep having to admit people from the waiting  
16 room -- but it certainly means that the company not only  
17 knew, but expected that people would use their phones for  
18 work, right?

19 MR. COLEMAN: Your Honor, I don't believe it's  
20 accurate that all employees and all of the custodians at  
21 issue here were required to have phones for work purposes.

22 But even putting that aside, the Sedona Conference  
23 guidance that Hormel cites in its brief is really helpful in  
24 terms of reviewing the types of considerations that  
25 companies have to make with regard to the design of a mobile

1 device program. There's a host of considerations. There's  
2 the expense of the phones. There's the imposition on  
3 employees of, you know, when they are being used for work.  
4 There's the right of access to company data or the company's  
5 right of access to its phones. And there's employee privacy  
6 issues.

7 So companies have to work through those  
8 considerations and reach a judgment call about what's right  
9 for the company, its culture, and what its position is on  
10 its legal right and its practical ability to access phones.  
11 Hormel Foods did that here.

12 So even if it were true that employees are  
13 required to have a personal phone and bring it to work,  
14 Hormel Foods recognizes that those phones might be used to  
15 access company systems and company data, but on the other  
16 hand, they are used for a host of personal reasons that  
17 include family pictures and all the kind of personal apps  
18 that people use.

19 And it specifically committed in the mobile device  
20 policy and program that it will not -- it does not claim the  
21 legal right to access personal data on cell phones. That's  
22 the policy that Hormel Foods designed. It designed it well  
23 before -- years before this litigation. It's been --

24 THE COURT: Hold on. I am having a little trouble  
25 hearing you. I don't know if you need to get a little

1 closer to the microphone, but some of your words are getting  
2 a bit muffled.

3 MR. COLEMAN: I'm sorry, Your Honor. I'll lean in  
4 and speak up; and if it continues, I can also dial in by  
5 phone if that becomes necessary.

6 THE COURT: Okay.

7 MR COLEMAN: But I will do my best. Thank you,  
8 Your Honor.

9 THE COURT: That's better.

10 MR. COLEMAN: So let me know if I have answered  
11 your question, and I think I will speak to it more as we  
12 proceed and I do intend to address the possession, custody,  
13 or control question with a little bit more detail.

14 But the mere fact that employees use their phone  
15 for work purposes is not enough. It does not address the  
16 legal test as to whether a company has a legal right or  
17 practical ability to access personal data on cell phones.

18 The plaintiffs, as I understand it, are not taking  
19 the position that Hormel has the legal right to do it. They  
20 are falling back on the practical ability that Hormel can  
21 march an employee into a conference room, demand access to a  
22 phone, and the company -- and the employee will roll over  
23 and give up to that.

24 As the Sedona Conference makes very clear, it's  
25 wrong, it's improper for courts or litigants to assume that

1 an employer can demand access to an employee phone simply  
2 because the custodian is an employee.

3 THE COURT: Isn't there a fair amount of room on  
4 the spectrum short of saying, you know, give me your phone  
5 or I am your boss, give me your phone, please, and saying  
6 I've got no ability to request any information from that  
7 phone?

8 I mean, I think even in your brief you indicated  
9 that to the extent there was -- I think you said that to the  
10 extent there was information on personal devices that was  
11 company information or e-mail, you searched for and produced  
12 it, right?

13 MR. COLEMAN: Company data on the phone duplicates  
14 the material that was accessed. So e-mail system. If an  
15 employee uses their iPhone to access the company's e-mail  
16 system, that information is saved on Hormel Foods' systems.  
17 So there's not -- with respect to the e-mail, there's not  
18 unique responsive information on the employee phones.

19 THE COURT: But if somebody used their phone to  
20 send a substantive work-related text, isn't that company  
21 data?

22 MR. COLEMAN: No, Your Honor, it's not. I would  
23 refer Your Honor to the mobile device policies that Hormel  
24 has established and the practical -- the IT infrastructure  
25 that it has in place. Hormel Foods does not claim a right

1 to personal data, including text messages on --

2 THE COURT: I'm not talking about a personal text  
3 message. I'm talking about a work-related text message, a  
4 text message somebody did for the purpose of, you know,  
5 accomplishing something on the job. Why isn't -- why  
6 wouldn't that be company data?

7 MR. COLEMAN: It's the same answer, Your Honor.  
8 The only right that Hormel has claimed in its mobile device  
9 policies is the ability to remotely wipe data to protect --  
10 remotely wipe a phone to protect company data. It does not  
11 have visibility to text messages. It doesn't claim an  
12 ability to do that, to obtain company text messages.

13 THE COURT: Did Hormel tell its employees that  
14 they must not use text messaging or ephemeral messaging or  
15 the like to conduct company business?

16 MR. COLEMAN: I can't point to a specific policy  
17 on that. What I can point to are the facts that very few  
18 custodians did that, and we can go through some of those  
19 facts in detail. Mr. Rock can speak to it as well because  
20 he has also -- you know, he and his firm have spoken to each  
21 and every custodian.

22 THE COURT: Had Hormel interviewed the custodians  
23 itself with regard to their use of their personal cell  
24 phones to conduct company business by text message; had  
25 Hormel asked those questions?

1 MR. COLEMAN: Yes, Your Honor, and I want to speak  
2 to that because Mr. Bourne's statement to the contrary is  
3 flat-out wrong, and it bothers me because I personally told  
4 Mr. Bourne during the meet-and-confer that Hormel Foods  
5 interviewed the custodians about their use of cell phones.

6 And there was quite a bit of effort on Hormel  
7 Foods' part and the part of its counsel to lead up to the  
8 statement that it's not aware of unique responsive  
9 information on its employee phones. There was legwork that  
10 went into that. We told Mr. Bourne that. I personally told  
11 Mr. Bourne that. And that wasn't good enough, being told  
12 that was not good enough. He asked for details about those  
13 conversations and what was asked, and at that point I shut  
14 the conversation down based on attorney-client privilege.  
15 Hormel Foods does not waive privilege of its custodian  
16 interviews, as it's its right not to do.

17 So, yeah, to set the record straight, Hormel Foods  
18 did, in fact, as a matter of both preservation and document  
19 collection, interview each and every custodian.

20 And I would add that Mr. Rock's, the firm -- the  
21 efforts that his firm put into this matter substantiate  
22 Hormel Foods' own efforts. Mr. Rock's firm provided letters  
23 to plaintiffs stating objections to the subpoena, but also  
24 going through a lot of the details, disclosing a substantial  
25 amount of information about how phones were or were not used

1 for work. So plaintiffs have that information.

2 Hormel Foods' investigation is further  
3 substantiated by the plaintiffs' own evidence. They point  
4 to a grand total of five custodians that texted other  
5 numbers they purport for work. Four of those are internal  
6 Hormel Foods numbers, and plaintiffs want to assume that  
7 that was for work purposes. That's a leap. These are  
8 colleagues. They could have been texting about where to  
9 meet for happy hour.

10 But I also think we need to look -- the Court  
11 should look, to understand the scope of what's at issue  
12 here, the scope of potential discovery on cell phones, the  
13 Court should look at the plaintiffs' own subpoena and that  
14 subpoena established the outer limits of what's potentially  
15 relevant from cell phones and we're talking about, one,  
16 communications to other defendants; two, communications to  
17 pork integrators; and, three, communications about the  
18 conditions of supply and demand in the pork industry.

19 And all four of the internal Hormel Foods'  
20 custodians that purportedly texted one another, those are  
21 internal jobs. Most of them are pricing-related jobs that  
22 do not communicate with anybody outside of Hormel Foods for  
23 work. So unless they were sending substantive text messages  
24 to one another about conditions of supply and demand in the  
25 pork industry, there's no relevant discovery there.



1           And plaintiffs don't accept that -- they want it  
2           searched, but I think it's entirely plausible that  
3           Mr. Rock's custodian interviews are correct and they were  
4           not texting one another about conditions of supply and  
5           demand in the pork industry. And even if there was a  
6           work-related text, it was I'm running late to a meeting or,  
7           you know, something like that, my kid is sick and whatever.

8           So Hormel did a substantial amount of effort to  
9           interview its custodians and ensure preservation. I can  
10          tell you, Your Honor, standing here today -- sitting here  
11          today in my office, that Hormel Foods is not aware of any  
12          unique responsive information on its custodians' cell phones  
13          and certainly not aware of any unique responsive information  
14          that's been at issue or has been lost or is in danger of  
15          being lost.

16          THE COURT: So just to unpack that a little bit,  
17          when you talk about unique, what you are saying is that  
18          you're not aware of anything that's responsive that's on  
19          their cell phones that isn't also in the e-mail system or  
20          elsewhere in the -- among Hormel's data; is that what --

21          MR. COLEMAN: That's correct, Your Honor.

22          THE COURT: -- what you mean by "unique"?

23          MR. COLEMAN: That language tracks the ESI  
24          protocol. I would refer Your Honor to paragraph V(E) and  
25          that the ESI protocol specifies what the parties are

1       supposed to do with respect to their custodians' cell  
2       phones; and the ESI protocol requires parties to use, quote,  
3       unquote, reasonable steps to identify unique responsive  
4       information on cell phones. And we're quite confident that  
5       reasonable steps includes actually talking to the custodians  
6       and interviewing them.

7               Again I'd refer Your Honor to the Sedona  
8       Conference principles that we cite in the brief. There the  
9       Sedona Conference refers to custodian interviews as an  
10      appropriate method to establish whether unique responsive  
11      information exists on phones. That's also an old-school  
12      method of discovery that's been used for time immemorial.  
13      Every case I have been involved in, you start with a  
14      custodian interview to understand where responsive documents  
15      might reside and if, for example, a custodian tells the  
16      lawyer that they don't save work-related documents in their  
17      home office, I've never been in a situation where we just  
18      refuse to believe them and nonetheless demand to go search  
19      their home office, and that is effectively what -- that's  
20      exactly what plaintiffs are asking here.

21              So even though a custodian doesn't have a job  
22      responsibility that would involve communicating with another  
23      defendant and even though a document custodian states that  
24      they do not use their cell phone for work, plaintiffs are  
25      nevertheless asking the Court to order imaging and search of

1       those phones. That's unreasonable.

2               THE COURT: And so, again, just to unpack, when  
3       you said to plaintiffs and when you have said in your  
4       briefing that Hormel is not aware, I mean, that was -- you  
5       intended that as a much more active representation, that  
6       this is not the, well, it hasn't come to my attention or --  
7       but that there were active efforts to interview these  
8       custodians specifically about text messages on their cell  
9       phones? In other words, just because Hormel doesn't believe  
10      it has control over those, you specifically interviewed  
11      about text messages on the cell phones; is that correct?

12             MR. COLEMAN: That is correct, Your Honor, and  
13      I --

14             THE COURT: And --

15             (Simultaneous indiscernible crosstalk)

16             THE COURT: And did you specifically tell them  
17      that their preservation obligations extended to keeping text  
18      messages -- relevant text messages on their cell phones?

19             MR. COLEMAN: Yes, Your Honor. So all custodians  
20      were subject to a legal hold. That legal hold was discussed  
21      with plaintiffs. It included cell phones. And as further  
22      proof of that point, I would point to the letters that  
23      Mr. Rock's firm provided to plaintiffs that discuss and  
24      disclose that they revisited the legal hold obligations with  
25      the custodians and were assured that custodians understood

1 their obligations to preserve personal data on cell phones.

2 THE COURT: Okay. Go ahead, Mr. Coleman.

3 MR. COLEMAN: So regarding -- returning to the  
4 question of possession, custody, or control, I again would  
5 urge the Court to or at least refer the Court to the Sedona  
6 Conference guidance -- principles and guidance that we cite  
7 in our brief just because it gives a thorough exposition of  
8 the law and the consideration -- the underlying  
9 considerations.

10 The Sedona Conference cites this court's decision  
11 in the *Ewald* case that is cited on page 14 of our brief, and  
12 that case supports Hormel Foods' position here where this  
13 court drew a sharp distinction between employer-provided  
14 phones and employee-owned phones. And Hormel Foods'  
15 position that it does not have a legal right or the  
16 practical ability to access employee phones is upheld in  
17 both the Sedona Conference principles and the *Ewald* case.

18 Now, with regard to Mr. Bourne, he does not seem  
19 to be arguing that Hormel Foods has a legal right to access  
20 employee phones. He focuses on the practical ability, and  
21 that reduces to the idea that, well, if you ask employees,  
22 they're going to roll over, they know where their bread is  
23 buttered.

24 I don't think -- so let me just start with  
25 practical ability should focus on the technology and the

1 IT infrastructure and the actual program and policies in  
2 place. And with respect to that, Hormel Foods does not have  
3 the ability to monitor its employees' phones, access phones,  
4 et cetera. It's made that choice. That's something that it  
5 could have required consent or acknowledgement and installed  
6 that type of software. Hormel Foods did not for principled  
7 reasons that it has consistently adhered to over time.

8 And the Sedona Conference is quite clear that  
9 employees should not be put to the burden or the coercion  
10 of an employer saying, "Give me your phone, I want to image  
11 it."

12 With respect to Your Honor's question about, well,  
13 isn't there some way to kind of finesse this, some  
14 reasonable middle ground, I would respectfully push back on  
15 that notion and we just have to think through what does a  
16 court order to Hormel Foods entail.

17 So the plaintiffs want to urge the Court to issue  
18 an order declaring that Hormel Foods has possession,  
19 custody, or control and that Hormel Foods must image and  
20 search and produce documents on those phones. Hormel Foods  
21 doesn't have the phones. It doesn't have the passwords. So  
22 it's got to literally walk its employees into the office,  
23 ask them to turn over their phones and their passwords, and  
24 then image the entire devices, which is extremely invasive  
25 given the nature of phones and the expectation of privacy

1       that employees have in their phone, particularly given  
2       Hormel Foods' custom, practice, and policies.

3               THE COURT: Let me ask this. Let's say those  
4       interviews you conducted had turned out differently and you  
5       had a half a dozen employees who said, "Yeah, I use text all  
6       the time on these very subjects. Yep, I got quite a few of  
7       them." What would you be doing then? Are you saying that,  
8       notwithstanding that, you would still be having to take the  
9       position or would still be taking the position that Hormel  
10      as a company couldn't insist that those text messages be  
11      made available for -- to you for review and production?

12             MR. COLEMAN: Hormel Foods' policy is its policy  
13      and it would abide by the policy that it's committed to with  
14      its employees.

15             So what I would -- obviously, preservation would  
16      become all that much more important, not that Hormel Foods  
17      didn't otherwise fulfill all of its preservation  
18      obligations. I think in that case you have to go out of  
19      your way to ensure that materials were preserved.

20             But the recourse is exactly what plaintiffs avail  
21      themselves of here. They can see that they were notified of  
22      Hormel Foods' position in the months after the litigation  
23      was filed, all the way back to fall of 2018. And once they  
24      got into discovery, additional custodians were added. Then  
25      they decided they wanted discovery of all the custodians.

1 They went and issued subpoenas to every one of them, which  
2 is their right to do. We think it was overbroad and an  
3 overreach, but they did it. It's a tool under the federal  
4 rules and they used it.

5 Not only that, but plaintiffs were aided by the  
6 fact that the document custodians all retained a single  
7 counsel, single point of contact. So it was laid out for  
8 them to go negotiate with the custodians' counsel and obtain  
9 reasonable discovery of the phones. We think that's the  
10 appropriate answer --

11 THE COURT: Okay.

12 MR. COLEMAN: -- given Hormel Foods' policies and  
13 positions.

14 THE COURT: All right. So you've got no quarrel  
15 with the idea that subpoena is the recourse when it comes to  
16 personally-owned phones, but you take issue with whether it  
17 was used appropriately here given the information available  
18 about what's probably not on those phones from your  
19 perspective?

20 MR. COLEMAN: Yes, Your Honor. I mean, we'll  
21 defer that to Mr. Rock's argument. Hormel Foods has not  
22 inserted itself into those negotiations. It did not file a  
23 motion to quash. We haven't objected to the subpoenas.  
24 We've let that run its course.

25 From the outside looking in at those negotiations,

1 Mr. Rock's firm was engaged with plaintiffs. The chain of  
2 correspondence reflects a desire to negotiate, a willingness  
3 to negotiate. And from our perspective, it seems clear that  
4 plaintiffs just decided to turn their back on those  
5 negotiations and file this motion instead.

6 THE COURT: Okay.

7 MR. COLEMAN: And I would in particular refer Your  
8 Honor to Exhibit G to Ms. Stephens' declaration, which is  
9 the last letter that plaintiffs [sic] sent before this  
10 motion was filed, and it's all but begging plaintiffs to  
11 negotiate. Start with the phones that were imaged. Let's  
12 talk about search terms, get reasonable parameters.  
13 Plaintiffs could and should have gone down that road and  
14 obtained the discovery that they thought was appropriate.  
15 For whatever calculated reasons, they didn't and they teed  
16 this motion up instead. I mean, we do think that is  
17 improper. I will let Mr. Rock speak to it. Hormel Foods is  
18 not -- it's not our argument or objection to make.

19 THE COURT: All right. Well, that suggests I  
20 probably ought to let Mr. Rock get a word in edgewise. And  
21 then, of course, I will give Mr. Bourne a chance to reply.

22 MR. COLEMAN: Thank you, Your Honor.

23 MR. ROCK: Thank you, Your Honor. As the Court  
24 knows, my firm represents the 30 different subpoena  
25 recipients that have been referred to by plaintiffs' motion.



1 Those are 30 different people, each with very different  
2 situations and circumstances. Basically the one thing -- or  
3 maybe two things that each of them have in common is that  
4 they at one time worked for Hormel and they have a cell  
5 phone, and beyond that there is quite a bit of difference  
6 between my clients.

7 That's, frankly, been one of the frustrating  
8 issues in our meet-and-confers with plaintiffs' counsel and  
9 then in responding to this motion, is that we've got -- of  
10 our 30 clients, 13 of them are former employees. Only 17 of  
11 them are current employees. The one who has been longest  
12 retired retired in 2012, so more than nine years ago.

13 They also work in a variety of different  
14 departments and have very different responsibilities. One  
15 of our compliance -- one of our clients was the director of  
16 investor relations. One of our clients is the CEO. And it  
17 runs the gamut from a person who was in charge of hog feed  
18 at one time in the 2010s. So everybody is very different.

19 And one thing -- it has come up in your questions  
20 and from both of the counsel that have argued before me,  
21 that I would like to address, is that we received the exact  
22 same subpoena for each 30 of our clients, and they kind of  
23 came in waves.

24 And after I was retained by a particular client,  
25 either my colleague, Kathy Stephens, or I, we had a

1 conversation with the client and we learned about their  
2 situation. And we said: Here's your subpoena. Let's talk  
3 about this and figure out what there is and if you've got  
4 anything responsive, whether there are appropriate  
5 objections or not.

6 And, you know, we talked about -- we talked with  
7 them about their responsibilities and how -- at what time  
8 they had what responsibility. And, of course, in a  
9 corporate setting, many of our clients changed  
10 responsibilities and changed roles over this ten-year time  
11 period.

12 And that's the other thing that has struck me --  
13 and, of course, I'm very new and I guess hopefully temporary  
14 to this case that I see is on at least Docket 925 now -- is  
15 that the time frame at issue here is from 2008 to 2018, and  
16 obviously there has been a lot of change in the world and in  
17 communications over that time frame.

18 We talked with them about how they use their  
19 telephones for work and we talked about -- we talked with  
20 them about whether or not they use text messaging for work.  
21 We talked with them about how many phones have they had  
22 since 2008 and how many different cell carriers have they  
23 had.

24 As I thought about this myself, I think I'm on  
25 phone seven or eight since 2010, and it might be more than

1       that. And that was really consistent throughout. You know,  
2       phones get lost. Phones get broken. Phones get updated.  
3       So that was -- I guess another thing, besides everybody  
4       having a phone, was that their phones had changed over the  
5       past 13 years.

6               What we found out, also consistently from our  
7       clients, is that most of them never texted about work and  
8       especially with anybody outside of work about work.

9               And then when you drill down and one thing we need  
10      to remember here is that the request -- and I think from  
11      hearing Mr. Bourne's argument, it appears that the real  
12      request from the subpoenas that is at issue here is Request  
13      Number 1.

14              And Request Number 1 seeks copies of each text  
15      message that you sent or received during the relevant time  
16      period, which is 2008 through '18, with any employee or  
17      representative of a pork integrator or other individual with  
18      whom you communicated about supply and demand conditions in  
19      the pork industry. So, you know, ultimately that's where  
20      our focus was on the text messages.

21              And I've noted, I guess, first from plaintiffs'  
22      motion papers and then from Mr. Bourne's argument today,  
23      that things have kind of quietly shifted from text messages  
24      about supply and demand conditions in the pork industry to  
25      work-related texts. There is no subpoena request for

1 work-related texts.

2 And I think Your Honor's question to Mr. Bourne  
3 early on and his response to that was telling in that in  
4 their motion papers they talk about -- they identify five of  
5 my clients who they say had work-related texts. And as it  
6 turns out, what they are calling work-related texts are  
7 apparently texts between phone numbers of Hormel employees.

8 And, of course, Austin, Minnesota, is not a huge  
9 town. Most of my clients live in Austin, not all of them,  
10 but most of them do. And in a town of 25,000 people, Hormel  
11 is by far the largest employer. And to assume that because  
12 two people who work at Hormel in Austin have texted one  
13 another, that they are texting about work is really a very  
14 far leap and there is no support for that.

15 What was most telling from Mr. Bourne's answer to  
16 your question was that they have seen no text messages  
17 between my clients and any other defendants from any other  
18 companies. And if there was something like that, we might  
19 have something to talk about.

20 But interestingly enough, we were asking  
21 Mr. Bourne and his colleague the same information during our  
22 meet-and-confers, where we said: Our people are very  
23 different. This is a wide-ranging subpoena in that it seeks  
24 text messages that would hit on -- whatever it is -- 891  
25 phone numbers, whose phone numbers are not identified, and

1 also would hit on 330 different keywords.

2 And the keywords, some of them are specific. Some  
3 of the keywords are "buy," b-u-y, "drive," "practice,"  
4 "together." And as a parent who used to have kids in  
5 traveling sports, it's not beyond imagination to send a text  
6 to a co-worker saying that I have to drive my kid to  
7 practice or could you drive my kid to practice and so on and  
8 so forth. But the terms are very broad.

9 So we asked if, first of all, they would identify  
10 some of our clients who they thought actually would have  
11 responsive e-mails related to communications about supply  
12 and demand conditions in the pork industry. They wouldn't  
13 do that. They couldn't do that.

14 We asked them to consider cutting down the search  
15 terms. They flat out said, no, we won't do that. It  
16 appears that you don't want to deal with us. So we will  
17 file our motion, which is essentially what they told us in  
18 our last meet-and-confer.

19 THE COURT: Let me ask this. I mean, certainly  
20 Mr. Bourne and his colleagues are not asking that all  
21 work-related texts be produced. As I understand their  
22 argument, it's they are looking for some way to determine  
23 what the universe may be and then to have -- but still a  
24 relevance review of things either that -- of texts that are  
25 between numbers that are work numbers or that hit on terms

1       that could have been used in relevant e-mails.

2               So given that texts aren't really susceptible to  
3       search in the same way that e-mails are, for example, have  
4       you looked, for example, at what the burden would be here?  
5       I mean, how many texts would actually have to be reviewed in  
6       order to determine that they either are or aren't texts that  
7       are responsive to their -- that are actually responsive to  
8       their subpoena?

9               MR. ROCK: First of all, as far as the number of  
10       texts, I do not -- I cannot answer that question. That, to  
11       my understanding, would require us to get our clients'  
12       phones, image them, and figure out how many text messages  
13       they have.

14               As it relates to burden, here's what I do know.  
15       It would require -- to have their phones imaged, it would  
16       require each of our clients to bring their phone in. Some  
17       of them are in Austin, so presumably we could have the  
18       forensic third-party provider do that at a location.

19               But they told us, the forensic provider told us  
20       that that process per phone, depending on the type of phone,  
21       how much data is on that phone, could take anywhere between  
22       three hours to more than a day per phone. That's a real  
23       concern for my clients. As Justice Roberts has famously  
24       pointed out more recently, cell phones are really very  
25       personal and we hardly function without them anymore. So

1 that is a real burden just for the people that live in  
2 Austin.

3 The burden would be greater for -- I have a client  
4 who lives in Wisconsin, a client who lives -- a couple  
5 clients in outstate Minnesota, another client in Nebraska, a  
6 client in Washington, a client in Arizona. And that is --  
7 if we use the same provider, it's send their phone in and,  
8 of course, that's a many-day ordeal to be separated from  
9 their phone.

10 And then I asked the provider for just a -- what's  
11 going to be the baseline cost to do this for 30 clients, and  
12 the smallest number I got was \$65,000 to do that for  
13 everybody and I'm guessing that number is likely to go  
14 higher than lower if we actually got to that point. So  
15 there are some real burden issues there.

16 One thing I did want to clarify is that while the  
17 subpoena, Request Number 1, is clear that they are  
18 requesting texts about supply and demand conditions in the  
19 pork industry, Mr. Bourne in his letter to myself and  
20 Ms. Stephens points out very clearly so that -- he says that  
21 there is no question about it, is that their position is  
22 that any text messages to any of the 700 or 800 phone  
23 numbers on their list, that those are automatically  
24 responsive and would have to be provided without a  
25 relevance -- a further relevance review beyond that, which

1 that's one clear example of the compromise from plaintiffs  
2 becoming much greater than the subpoena itself because that  
3 is not in the subpoena at all.

4 Another thing that has struck me with this motion  
5 is that it seems like my clients, kind of, really aren't the  
6 issue here and I'm not sure the plaintiffs really want  
7 whatever the searches return from their phones, and they  
8 probably definitely don't want to find out that the phones  
9 had been searched and find out that there are no responsive  
10 text messages.

11 The motion itself does not identify one of my  
12 clients. It does not identify one of the requests or topics  
13 from the subpoena. And it does nothing to explain why any  
14 or all of my clients are likely to have responsive text  
15 messages.

16 And, I mean, we know why that is. There's just --  
17 they've got -- apparently have the data that shows the  
18 inter-defendant communications and shows that text messages  
19 happened or didn't happen, and they have not shown any  
20 inter-defendant text messages involving my clients.

21 And that, as I said, was something that we had  
22 asked for to see if there was a solution, a compromise  
23 position, where we could identify a handful of people who  
24 would likely have what they thought would be responsive; and  
25 we've gotten nothing along those lines.



1           THE COURT: I should give Mr. Bourne a chance to  
2           reply. Any other points? And, obviously, I got thorough  
3           briefs and 900 pages of information from you all. But any  
4           other points you wanted to make sure to address while you've  
5           got me live and on screen?

6           MR. ROCK: Yes. Thank you, Your Honor. Just one  
7           last point, and this really dovetails with the information  
8           that we got from our clients.

9           When asking kind of the ultimate question, do you  
10          have any texts or did you ever text about supply and demand  
11          conditions in the pork industry or about price-fixing, the  
12          few of my clients who actually had anything to do with pork  
13          or pricing or purchasing of pork laughed at me and said  
14          that's silly because we had to buy most of our pork that we  
15          used and it was -- it would be completely opposite of what  
16          our job was, that we would be texting somebody else at a  
17          competitor trying to figure out a way to prop up pork  
18          prices, because I was trying to buy pork and my boss wasn't  
19          going to be very happy if I worked out some great  
20          price-fixing scheme to prop the price up.

21          So it wasn't as if our clients said, "No, I just  
22          don't remember such a text." It was: "I don't remember  
23          such a text and it would be crazy for me to have sent or  
24          received such a text." So a little more context there that  
25          I think is helpful as well.

1 But unless the Court has any other questions for  
2 me, I will yield. I appreciate the Court's time.

3 THE COURT: All right. Thank you, Mr. Rock.

4 Mr. Bourne, back to you.

5 MR. BOURNE: Thank you, Your Honor.

6 I think that asking someone whether they texted  
7 about price-fixing, the result they're going to say no,  
8 that's going to be predictable and it's largely beside the  
9 point.

10 You know, I hear in there the idea that Hormel  
11 didn't do what it's accused of doing in this lawsuit, but  
12 the Complaint has been upheld and that's why we have  
13 discovery.

14 I wanted to respond on the collection of text  
15 messages. My understanding is that it is now possible, and  
16 this may have been hastened by the pandemic that we've all  
17 been dealing with for the last year and a half, but it's now  
18 possible to do a remote collection so that the vendor can  
19 send a kit to the custodian and it can collect the data  
20 overnight while the person is asleep. So the disturbance to  
21 the particular custodian would be minimal.

22 And as for the cost of compliance, I believe we  
23 were talking about \$65,000 in the aggregate, which is  
24 obviously much smaller per person. I could have  
25 misunderstood. But my understanding is that Hormel is

1 paying its custodians' bills here, which is why they have  
2 all retained the same counsel, and so the cost to the actual  
3 custodians would be nothing.

4 As far as people who don't have their cell phones  
5 from 2012 anymore, you know, that's obviously true. At a  
6 certain point they all had a preservation obligation  
7 beginning in 2018, and so at that point any text messages  
8 certainly were required to be preserved and should not have  
9 been lost.

10 But I think it's also important to keep in mind  
11 that cloud backup exists and so if you have an iPhone,  
12 there's a good chance that your text messages have all been  
13 backed up to the cloud via Apple software. I believe that  
14 Google Message does the same thing on Android phones.

15 As for, you know, plaintiffs not having evidence  
16 of the existence or content of inter-defendant texts, I  
17 think it's important to keep in mind, again, that if it's an  
18 iPhone to iPhone text, it will be using iMessage and we  
19 won't get that log data. The existence of the text message  
20 from the carrier, that can only be obtained from the iPhone.

21 But also plaintiffs don't have an obligation to  
22 prove the existence of conspiratorial communications in  
23 order to discover those communications or have the relevant  
24 parties search for them. That would be a standard that  
25 would be almost impossible to meet.

1           It also -- regarding the privacy concerns that  
2           Mr. Coleman raised, I understand it would be possible for a  
3           vendor to limit its data pull so the third-party vendor  
4           could only pull the text messages or the content from a  
5           messaging app and then the vendor could run the searches and  
6           only provide to the attorneys the hits on those searches.  
7           So the privacy issues would be as minimized as possible,  
8           depending on how counsel and the vendor went about  
9           undertaking this effort.

10           It also appears that Hormel is attempting to use  
11           attorney-client privilege as both a sword and a shield here  
12           by saying we asked these people and they don't have any  
13           responsive text messages, but otherwise refusing to describe  
14           the questions that they asked them about text messaging.

15           Ultimately, Your Honor, the plaintiffs submit that  
16           it's just too hard for a custodian to know whether they've  
17           sent relevant text messages. The way to figure that out is  
18           to search for them. If there aren't any, then great,  
19           there's nothing to produce. If there are some, counsel can  
20           review those for responsiveness and privilege and produce  
21           whatever exists.

22           Unless Your Honor has any further questions from  
23           me, that is all that I have at this point.

24           THE COURT: All right. No, I think -- let me just  
25           take one more look through my notes. Okay. Nope, I think

1 one way or another we covered my questions. Thank you,  
2 Mr. Bourne.

3 All right. I am going to take this under  
4 advisement. I will get an order out as quickly as I can. I  
5 appreciate the arguments this afternoon. And we are  
6 adjourned.

7 (Court adjourned at 5:06 p.m.)

8 \* \* \*

9  
10  
11 I, Lori A. Simpson, certify that the foregoing is a  
12 correct transcript from the record of proceedings in the  
13 above-entitled matter.

14  
15 Certified by: s/ Lori A. Simpson

16 Lori A. Simpson, RMR-CRR  
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